83-837

NO. 83-____

Office - Supreme Court, U.S.
FILED
NOV 10 1983
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1983

STATE OF ARIZONA,

Petitioner,

-vs-

DENNIS EARL ROUTHIER,

Respondent.

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

ROBERT K. CORBIN
Attorney General of
the State of Arizona

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division

GERALD R. GRANT
Assistant Attorney General
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602)255-4686

Attorneys for PETITIONER

QUESTION PRESENTED

Where the defendant had invoked his right to counsel to end police interrogation concerning a murder, were his fifth and fourteenth amendment rights violated when 3 days later, after a different police officer had approached him about two unrelated homicides, he volunteered statements about the first homicide after being advised of and waiving his constitutional rights?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

AUTHORITIES

OPINION BELOW

The 1983 Arizona Supreme Court opinion holding that Routhier's fifth and fourteenth amendment rights were violated when the second officer reapproached him is reported as State v. Routhier, ___ Ariz. ___, 669 P.2d 68 (1983). That opinion is appended here as Exhibit "A." The order denying the motion for rehearing on the 1983 opinion is appended as Exhibit "B."

STATEMENT OF JURISDICTION

The opinion of the Arizona Supreme Court that the state asks this Court to review was entered on July 6, 1983. The order of the Arizona Supreme Court denying the state's motion for rehearing was filed on September 14, 1983. This petition was filed within 60 days from that order. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fifth amendment to the United States Constitution provides:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

The pertinent part of the Fourteenth amendment to the United States Constitution provides:

> (N)or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

On October 2, 1980, Dennis Earl Routhier, the respondent, was charged with first-degree murder and attempted first-degree murder. On September 20, 1980, Mr. Routhier flagged down Lawrence Barrick and his 23-year-old son, Robert, and asked for assistance in starting his apparently disabled truck. The Barricks agreed to help, and Routhier's truck was eventually started. Routhier then

followed the Barricks to a canal west of Phoenix. Robert Barrick went swimming while his father and Routhier remained behind. Routhier took a hammer from his truck, beat Mr. Barrick to death, and stole his wallet. When Robert Barrick returned from his swim, Routhier struck him in the head with the hammer. However, the younger Barrick was able to escape and ran to a nearby highway looking for help.

Prior to trial, defense counsel filed a motion to suppress statements that Routhier had made to police officers after his arrest. The motion claimed that the statements were involuntary because Routhier had been in the hospital at the time of the police interrogation.[1] Defense counsel relied upon this Court's

---

1. Routhier was injured when his truck collided with another vehicle while being pursued by police officers.

decision in Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), to support his position.

At the hearing on this motion, the prosecution presented testimony from five witnesses, three of whom were hospital personnel. The other two witnesses were members of the Maricopa County Sheriff's Office. The hospital personnel testified that Routhier's injuries were not serious and that he was alert and not under the influence of medication at the time of his first conversation with the authorities. Detective F. Jordan Barber testified that he and Detective Zuleger spoke to Routhier at Good Samaritan Hospital on September 21, 1980. Detective Barber advised Routhier of his constitutional rights and he said that he understood those rights and was willing to talk with the officers. Routhier then

made statements about his activities on the day of the murder of Lawrence Barrick. Barber used no threat or force, and did not make any promises to Routhier.

Detective Jesse Locksa spoke with Routhier on September 24, 1980, at the county hospital. Detective Locksa also advised Routhier of his constitutional rights, and Routhier again expressed his understanding of those rights and his willingness to talk. Locksa further advised Routhier that he was not there to question him about the case he was in custody for, but about two other homicide cases. After Locksa had given him the names of the other homicide victims, Routhier made a statement about the Barrick murder. The defense presented no evidence at the hearing, and the trial court then ruled that Routhier's statements had been voluntarily made

after he had been advised of his constitutional rights, and that he had understood and waived those rights. No evidence that Routhier had asserted his right to counsel at any time was presented at this hearing.

Routhier went to trial before a jury in June of 1981. The prosecution called Detective Barber in its case-in-chief. Barber described his conversation with Routhier at Good Samaritan Hospital on September 21, 1980. He related how Routhier had described his activities on the morning of September 20, 1980, and how he had also talked about meeting Lawrence and Robert Barrick. Barber testified that Routhier had remembered hitting the Barricks with his fists, and had said that he might have been mad enough to use a hammer. On cross-examination, defense counsel asked Barber if Routhier had denied being

present at the scene of the killing, being involved in the high speed chase, or striking the Barricks. Defense counsel also asked about Routhier's physical condition at the time of those statements. The prosecutor then asked the detective if Routhier had told him anything about the victim having approached or threatened Routhier. Barber said that Routhier had not made any statements like that. Defense counsel made no objection to this testimony, but established on recross-examination that the detective had not asked Routhier about those areas.

Routhier testified at trial about his conversation with officers at the hospital, but remembered little of it. When the prosecutor asked Routhier about this conversation, he did not remember signing the officer's rights card, but did remember telling the police that he

had hit someone. Routhier recalled that Detective Barber was present, but thought that he had spoken with another officer. The prosecutor then asked if Routhier remembered telling the other detective that he had hit the old man after the old man got wise. Routhier did not remember that, and said that he told the officers he had no more to say to them but the officers kept asking questions. Routhier also said that he did not tell the officers that Mr. Barrick had been gouging his eye out. When asked why he had not told the officers that, Routhier said that he had told the officers that he wanted an attorney, but the officers kept asking questions and so he had refused to talk any more. Routhier also admitted that he had not discussed self-defense with the officers. The prosecutor then asked about Routhier's conversation with Detective Locksa on

September 24, 1980. Routhier remembered the conversation, and admitted that he had been advised of his rights, that he had understood them, and that he had agreed to talk to the officer. At this point the trial court took its evening recess.

The following day, defense counsel objected to further questioning of Routhier about the conversation with Detective Locksa because there had not been "an adequate showing of compliance with Miranda." The trial court pointed out that it had ruled on the admissibility of the statements prior to trial, and that the issue of their voluntariness would be submitted to the jury. (Id. at 7-8.)

The prosecutor then continued his cross-examination about the conversation with Locksa on September 24, 1980. Routhier now testified that he did not

recall being advised of his rights nor did he recall indicating that he understood his rights and was willing to talk to the officer. Routhier also did not recall making a certain statement to Locksa about the death of Mr. Barrick. On redirect, defense counsel reemphasized Routhier's testimony that he had requested an attorney.

In rebuttal, the prosecution recalled Detective Barber to the stand. The detective contradicted Routhier's version of their conversation on September 21, 1980, and stated that, when Routhier had requested an attorney, he had immediately terminated the interview. Barber denied that he had continued to interrogate Routhier after he had requested an attorney. Defense counsel elicited testimony that Barber had told Locksa about Routhier's request for an attorney.

The prosecution then called Detective Locksa to the stand. Locksa testified that he had interviewed Routhier on September 24, 1980, and acknowledged that he had spoken with Barber before that interview. After Locksa had testified that he had advised Routhier of his constitutional rights, and that Routhier had said that he understood those rights and would answer Locksa's questions, defense counsel objected to any further testimony on the ground that the prosecution had not shown "sufficient compliance with Miranda."

Counsel and the trial court then discussed the matter at the bench. After this discussion, the prosecutor asked no further questions of Locksa. Defense counsel, however, went back over Locksa's testimony that Barber had told him that Routhier had requested counsel.

The trial court then took a short recess and met with counsel in chambers to discuss the matter further. The prosecutor pointed out that Locksa had specifically advised Routhier that he did not wish to talk with him about the Barrick killing, but about other murder cases that Locksa was working on. The trial court stated that this changed matters since Routhier had made his statement to Locksa without being asked any questions about the Barrick killing. However, the prosecutor stated that to avoid any prejudice to Routhier, he would not seek to bring in testimony of Routhier's statements to Locksa.

The following day defense counsel moved for a mistrial based upon the prosecution's questioning of witnesses about Routhier's conversation with Detective Locksa. Defense counsel cited Edwards v. Arizona, 451 U.S. 477, 101

S.Ct. 1880, 68 L.Ed.2d 378 (1981), in support of his motion. Noting that Locksa had not interrogated Routhier about the Barrick murder, the trial court denied the motion for mistrial.

On June 26, 1981, the jury found Routhier guilty of first-degree murder and attempted first-degree murder. The trial court imposed a sentence of 21 years' imprisonment for the attempted murder, and a sentence of death for the murder.

In his appeal to the Arizona Supreme Court, Routhier argued that the trial court had erred in allowing testimony concerning his statements to Detective Locksa. On July 6, 1983, the Arizona Supreme Court reversed Routhier's conviction and remanded the case to the superior court for a new trial. One basis for the supreme court's ruling was that the statement Routhier had made to

Detective Locksa had been obtained in violation of his fifth amendment right to counsel. State v. Routhier, supra, ___ Ariz. at ___, 669 P.2d at 74-76.

ARGUMENT

In holding that Routhier's statements to Detective Locksa had been erroneously admitted due to a violation of Routhier's fifth amendment right to counsel, the Arizona Supreme Court relied upon this Court's decision in Edwards v. Arizona, supra. The Arizona court noted that these statements were made after Routhier had invoked his right to counsel during the interrogation by Detective Barber, that Routhier had not initiated the contact with Locksa, and that counsel had not been made available to Routhier prior to the Locksa interrogation. The only distinction that the Arizona court found

between Routhier's situation and that presented in Edwards was that Routhier was reinterrogated about an unrelated offense. However, the court concluded that this factual distinction held no legal significance for fifth amendment purposes. In so doing, the Arizona Supreme Court decided an important question of federal law that has not been decided by this Court.

In Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), this Court held that the fifth and fourteenth amendment prohibition against compelled self-incrimination requires advising an accused of his right to silence and his right to counsel prior to custodial interrogation. This Court also noted that if an accused invokes his right to remain silent, the police questioning must cease. Should the accused invoke his right to counsel, the police questioning

must cease until an attorney is present. Thus, Miranda established a fifth amendment right to have counsel present during custodial interrogation.

In Edwards v. Arizona, supra, this Court was presented with a situation wherein the accused had invoked his right to counsel to end police custodial interrogation. One day later, however, after the police had reapproached him and readvised him of his Miranda rights, Edwards made additional statements to the officers, and those statements were used against him at trial. Edwards argued to this Court that the subsequent police interrogation was in violation of his earlier invocation of his right to counsel. The question presented, then, was whether Edwards had made a valid waiver of his previously invoked right to counsel. This Court first noted that a waiver of counsel must not only be voluntary, but must also constitute a

knowing and intelligent relinquishment or abandonment of a known right or privilege. The question of waiver is one to be determined upon the particular facts and circumtances present in each individual case. This Court went on to distinguish between the invocation of the right to silence in Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), and Edwards' invocation of his right to counsel. Finally, relying on the facts that Edwards had not initiated the second contact with the police and that counsel had not been made available to Edwards, this Court concluded that Edwards had not made a valid waiver of his right to counsel.

In applying the holding in Edwards to Routhier's situation, the Arizona Supreme Court appears to have determined that Edwards created a new per se rule requiring a threshold inquiry into

precisely who had opened any conversation between the accused and the police. Since Routhier had previously invoked his right to counsel and counsel had not been made available to him, and since Routhier had not initiated the contact with Detective Locksa, the Arizona court concluded that, even though Locksa had approached Routhier on an entirely different manner, Edwards mandated a finding that Routhier had not made a valid waiver of his right to counsel.

Such a broad reading of this Court's holding in Edwards is unwarranted. In Justice Powell's concurring opinion in Edwards (joined by Justice Rehnquist), he disagreed with the notion that the majority had created a per se rule concerning "initiation" of the contact between the accused and the authorities. According to Justices Powell and Rehnquist, the ultimate question is

whether there was a free and knowing waiver of counsel before the interrogation commenced. That question is to be determined in light of all the circumstances present in the case; who initiated the contact is a relevant circumstance, but it is not a sine qua non. Justice Powell's interpretation of the Edwards holding appears to be an accurate one. In a recent per curiam decision, this Court rejected a claim that Edwards had established a per se rule forbidding a finding of waiver of counsel unless the accused had initiated the contact. Wyrick v. Fields, ___ U.S. ___, 103 S.Ct. 394, 74 L.Ed.2d 214 (1982). A ritualistic application of a per se rule based upon initiation of the contact appears even more unlikely in light of this Court's holding in Illinois v. Gates, ___ U.S. ___, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). In that case, a

majority of this Court abandoned the rigid and excessively technical application of the "two-pronged test" of Aquilar[2] and Spinelli[3] in probable cause determinations in favor of a "totality of the circumstances" analysis. In addition, at least one state court has rejected the notion that Edwards established a per se rule regarding initiation of the contact between accused and the police. See McFadden v. Commonwealth, 300 S.E.2d 924 (Va. 1983).

Therefore, the Arizona Supreme Court has decided an important question of federal law that has not been, but should be, settled by this Court: whether the fifth and fourteenth amendments prohibit officers from reapproaching an accused

---

2. Aquilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

3. Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

who has invoked his right to counsel after custodial interrogation concerning one offense and interrogating him about an entirely different case. The particular facts and circumstances presented in this case establish that no constitutional violation occurred. Detective Barber's initial interrogation of Routhier was accompanied by no threats, force, or promises. Routhier was not in physical pain and was not under the influence of any medication. When Routhier invoked his right to counsel, Barber immediately terminated the interrogation. Three days later, Routhier was in a different hospital. Again, he was not suffering physical pain and was not under the influence of any medication. Detective Locksa used no force, threats, or promises. He advised Routhier of his constitutional rights and Routhier replied that he understood those

rights and was willing to talk with the officer. Locksa informed Routhier that he did not want to talk about the Barrick killing but about other killings. At that point, Routhier made a statement about the Barrick homicide. There was no evidence that Locksa was using an investigation of the other killings as a subterfuge to gain information about the Barrick homicide. There was no evidence that Routhier was told that he had to talk with Locksa. Three days elapsed between Routhier's initial invocation of his right to counsel and the interrogation by Locksa, and Routhier spent that time not in a jail cell, but in a hospital. The facts and circumstances of this case are significantly different from those in Edwards and the Arizona Supreme Court erred in holding that Routhier did not make a valid waiver of counsel.

CONCLUSION

The finding that Routhier's fifth and fourteenth amendment right to counsel was violated was erroneous. The particular circumstances of this case establish that Routhier made a valid waiver of counsel when interrogated by Detective Locksa, but the Arizona Supreme Court erroneously interpreted Edwards to prohibit such a finding. For these reasons this Court should grant review of the opinion of the Arizona Supreme Court holding that the fifth and fourteenth amendments prohibited the admission of Routhier's statements to Detective Locksa.

Respectfully submitted,

ROBERT K. CORBIN
Arizona Attorney General

William J. Schafer III

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division

Gerald R. Grant

GERALD R. GRANT
Assistant Attorney General

Attorneys for PETITIONER

AFFIDAVIT OF SERVICE

STATE OF ARIZONA)
) ss:
COUNTY OF MARICOPA)

GERALD R. GRANT, a member of the Bar of this Court, being first duly sworn, deposes and says:

That he served three copies of the Petition for Writ of Certiorari upon TERRY J. ADAMS, Attorney for Dennis Earl Routhier, at 132 South Central, Second Floor, Phoenix, Arizona 85004 by depositing the same in the United States Mail, with first class postage prepaid.

Additionally, as a courtesy, I herewith certify that service of three copies of this petition has been made upon the United States of America by depositing the same in the United States Mail, with first class postage prepaid, addressed to the Solicitor General,

Department of Justice, Washington, D.C.

20530.

Gerald R. Grant

GERALD R. GRANT
Assistant Attorney General
Criminal Division
1275 West Washington
Phoenix, Arizona 85007

SUBSCRIBED AND SWORN TO before me this

10th day of November, 1983.

Elizabeth J. Bowler

NOTARY PUBLIC

My Commission Expires:
July 17, 1986

3031D:bb

APPENDIX "A"

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

Opinion of the Arizona Supreme Court

STATE OF ARIZONA,
Appellee,
-vs-
DENNIS EARL ROUTHIER,
Appellant.

Supreme Court No. 5390
Appeal from the Superior Court
of Maricopa County
Cause No. CR-115186
Filed: July 6, 1983
S. Alan Cook, Clerk

HOLOHAN, Chief Justice:

OPINION

A jury found appellant, Dennis Earl Routhier, guilty of first degree murder and attempted first degree murder. He was sentenced to death on the first degree murder charge and to 21 years on the charge of attempted first degree murder. Appellant appeals these convictions and sentences. We have jurisdiction of this case pursuant to Arizona Const. art. 6 § 5 and A.R.S. § 13-4031.

The appellant raises seven issues on appeal but we believe the answers to the following questions will be dispositive of the appeal:

1. Whether the scope of the prosecutor's cross-examination of the appellant violated his fifth and fourteenth amendment rights.

2. Whether photographs of the deceased and a bloody shirt were erroneously admitted into evidence.

3. Whether the trial court erred in not granting appellant's motion for acquittal on the count of attempted murder.

The following facts are necessary for a resolution of the issues presented.

On the morning of September 20, 1980, Lawrence Barrick and his son, Robert, stopped the vehicle in which they were travelling to aid a man who had flagged them down. Dennis Earl Routhier, appellant, told the Barricks he was having trouble with his truck. The Barricks drove the appellant to his truck, which was parked some distance off the main road. When the three men arrived at the truck, a '56 Chevy, the appellant stated he would make one more attempt to start it. The truck started unaided. The three men then sat on the tailgate of the Barricks' truck and drank some beer.

After finishing their beer, the Barricks drove to a friend's house. The appellant was invited to follow them in his own truck, and he did. The Barricks' friend was not at home so they decided to drive out to Roosevelt irrigation canal and take a swim. The appellant followed the Barricks to the canal.

Robert Barrick jumped into the canal and swam for five to ten minutes. As Robert began to climb out of the canal, the appellant approached him and hit him in the head with a hammer. Robert was cut and knocked unconcscious for a few seconds. He testified that appellant asked him if he had any money, to which Robert replied "No." Appellant then instructed Robert to get out of the canal or his father would be harmed. At this point Robert noticed that his father was slumped over on the ground by his truck. Robert climbed the opposite bank of the canal and ran to the nearby freeway to summon help.

Meanwhile, the appellant sped away in his truck. When the police arrived at the scene, they found Lawrence Barrick beaten and bleeding profusely from the head and neck. He died soon afterwards. Medical testimony revealed that he died of multiple wounds inflicted by a blunt instrument.

Later that afternoon, police apprehended the appellant after a high speed chase on the freeway. The chase terminated when the appellant's truck swerved into a semi-truck and rolled off the freeway. The appellant was taken into custody and admitted to Good Samaritan Hospital for treatment of head and leg injuries.

Appellant's testimony at trial was that he killed Lawrence Barrick in self-defense. He claimed that Barrick attacked him without reason and appellant only used his hammer when Barrick tried to gouge his eye out. Additional facts pertinent to questions raised by the appellant will be discussed as necessary.

HOSPITAL STATEMENTS

On the morning of September 21, 1980, Detective Barber of the Phoenix Police Department visited the appellant at Good Samaritan Hospital. The appellant was informed of his rights to silence and to the services of an attorney. He stated that he understood his rights and was willing to submit to questioning. Appellant signed a waiver of rights card, and the interrogation began. During the interrogation the appellant indicated that he remembered meeting an old man and his son, having a disagreement with the old man and hitting both individuals with his fists. When asked by Detective Barber whether he had used a hammer, the appellant stated that he may have been mad enough to use one, but he did not believe that he had. Detective Barber then asked the appellant to elaborate on specific details, but the appellant stated that he wanted to speak with an attorney. At that point, the questioning ceased.

Three days after the first interview at Good Samaritan Hospital, before counsel had been provided him, the appellant was interrogated a second time by a Detective Locksa. The interrogation was conducted at the detention ward of Maricopa County Hospital, where the appellant had been transferred from Good Samaritan Hospital. Detective Locksa had been advised by Detective Barber of the appellant's previous request for counsel. The appellant was again informed of his rights to silence and legal representation. Detective Locksa further told the appellant that he did not want to discuss the Barrick homicide

but that he wanted to discuss two unrelated homicide cases. The appellant stated that he was willing to talk to the detective. In response to Detective Locksa's questions regarding these unrelated homicides, the appellant implicated himself in the Barrick homicide. His precise words were, "I have never done anything like this before. The only reason I did what I did is that I was totally shitfaced, I probably would not have even hit the old man if it hadn't been for his big mouth."

The appellant was charged by indictment with having committed first degree murder and attempted first degree murder. Subsequently, pursuant to a plea agreement, the appellant appeared before the superior court to enter a no contest plea. At the hearing on the no contest plea a set of police reports and the medical examiner's report were admitted into evidence to establish a factual basis for the plea.

Before the plea was accepted by the superior court, the appellant asked to withdraw the plea. The request was granted, and the case was transferred to another superior court judge.

Prior to trial, the appellant moved to suppress all of his hospital statements[1] on the grounds that they

---

1. Those made during the first interview at Good Samaritan Hospital to Detective Barber and those made during the second interview at the County Hospital to Detective Locksa.

were involuntary due to appellant's physical condition at the time of interview. No mention was made of the appellant's request for counsel in his motion to suppress or at the voluntariness hearing. Both Detectives Barber and Locksa testified at the voluntariness hearing and neither one mentioned the appellant's request for counsel. The appellant's motion to suppress his statements was denied. The trial court found that the statements were voluntarily made after the appellant had waived his constitutional rights.

At trial, when the appellant was being cross-examined, the fact of his request for counsel was brought out by the prosecution. At that point defense counsel made a motion to preclude any questioning of the appellant regarding statements made by him during the second interview on the grounds of inadequate showing of Miranda[2] compliance. The trial judge denied the motion stating that he had already ruled that the statements were voluntary and admissible. Defense counsel, however, did not make any motion concerning the cross-examination of appellant on matters to which he had invoked his right to silence and counsel.

The prosecutor then questioned the appellant on the substance of his incriminating statement to Detective Locksa. Specifically, the prosecutor read the statement in court and asked the appellant if he remembered making it. The appellant stated he did not remember making such a statement.

---

2. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Detective Barber was recalled by the state in rebuttal, and he testified that the appellant had invoked his right to counsel during the first interview at Good Samaritan Hospital and that he told Detective Locksa before Locksa interviewed the appellant a second time, that the appellant had previously invoked his right to counsel. Detective Locksa testified that Detective Barber had, in fact, informed him that the appellant requested an attorney when Barber was interviewing the appellant.

Appellant challenges the admission of his hospital statements.

THE DOYLE ISSUE

The appellant argues that he was denied due process by the prosecutor's reference to his post-arrest silence. During cross examination of appellant the following testimony was elicited:

> Q. [by the prosecutor] But you don't remember that you had told them that it was possible that you used a hammer?
>
> A. Oh, yes, I think I might have told them it was possible I might have.
>
> Q. But you didn't tell them that the man had been gouging your eye out, did you?
>
> A. I don't recall. I don't think so. I don't think I'd want to tell them that.

Q. Why not?

A. Well, after I found out where I was and what I was -- you know, the situation I was in, I wanted to speak to a lawyer. I do recall asking him that or telling him that -- not him, but the other officer I talked to. I do recall saying I'd just as soon speak to an attorney, yes. I did hit the man, that's all I recall saying. However, I put it, that's exactly what I meant out of it was, yes, I did hit the man, and, yes, I'd like to see an attorney. They proceeded asking questions after I told them I wanted to see an attorney and kept on and on. What they got off that, I don't know. I'm sure it was just, you know, to show them that I was not gonna talk anymore.

Q. But at that time you at no point mentioned any kind of self-defense?

A. I don't think so. No, I didn't discuss any of the details with them.

The State also brought out in its case in chief on redirect examination of Detective Barber the following:

Q. BY MR. HOTHAM [the prosecutor]: Mr. Bohm [defense counsel] asked you whether it wasn't a fact that the defendant admitted to you that he had struck an older man and a younger man, is that correct?

A. That's correct.

Q. The -- did the defendant tell you anything about the victim coming at him?

A. The defendant made no mention at all of the victim attacking him or approaching him in any manner to me.

Q. Did he tell you anthing about the victim threatening him?

A. No, he did not.

Q. Did he tell you anything about the victim having a gun?

A. No, he did not.

Q. All he stated to you was that he remembers striking both the older man and the younger man, but thought it was with his fists, and then he might have been mad enough to pick up a hammer, but he did not recall doing that; is that correct?

A. That's correct.

Initially, we note that defense counsel made no objection to any of the questioning now being challenged. Although objection is usually required to preserve a question for appeal, an objection is not necessary in the case of fundamental error. State v. Navarre, 132 Ariz. 480, 647 P.2d 178 (1982). Because appellant asserts that fundamental error was committed in this case and we are obligated to review the record for such error, State v. Post, 121 Ariz. 579, 592

P.2d 775 (1979), we address appellant's contention that his post arrest right to silence was violated.

The United States Supreme Court has ruled that a defendant cannot be impeached by his post-arrest silence after being read his Miranda warnings. Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 48 L.Ed.2d 91 (1976); see Fletcher v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982). This ruling is consistent with Arizona case law which has established that a defendant's silence at the time of arrest cannot be used against him as inconsistent with testimony given at trial. State v. Anderson, 110 Ariz. 238, 517 P.2d 508 (1973); State v. Shing, 109 Ariz. 361, 509 P.2d 698 (1973); see State v. Ward, 112 Ariz. 391, 542 P.2d 816 (1975). These decisions are grounded on the principle that the Miranda warnings implicitly assure a person that the exercise of his rights carries no penalty and cannot be used against him. See Doyle v. Ohio, supra.

The State argues that the above rationale does not apply in this case because appellant waived his constitutional rights. While it might be true that appellant signed a waiver of rights card at the beginning of the interview with Detective Barber, appellant was not inextricably bound by that waiver. As stated in Miranda:

> Once warnings have been given, the subsequent procedure is clear. If the individual

> indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.
>
> * * * *
>
> Moreover, where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated. Miranda v. Arizona, 384 U.S. at 473-74; 475-76, 86 S.Ct. at 1627-1628.

In this case it is clear that, although appellant initially waived his rights, he subsequently reinvoked those rights by requesting an attorney. Detective Barber in fact testified that he understood appellant was invoking his rights and ceased questioning. Appellant's express invocation of his rights, as well as his failure to make a complete statement or to answer particular questions, distinguishes this case from, e.g., State v. Reinhold, 123 Ariz. 50, 597 P.2d 532 (1979); State v. Tuzon, 118 Ariz. 205, 575 P.2d 1231 (1978) and State v. Raffaele, 113 Ariz. 259, 550 P.2d 1060 (1976). While it was permissible for the prosecutor to question the appellant and Detective Barber on matters which the appellant had volunteered prior to reinvoking his rights, it was impermissible to ask questions on matters about which the appellant had not made any comment or given any information. In

doing so, the State violated appellant's fifth amendment right to silence.[3]

FUNDAMENTAL ERROR

Since the violation of appellant's constitutional rights constituted fundamental error, the remaining issue is whether the error was harmless. State v. Anderson, supra. From a review of the record we cannot say that the error was harmless beyond a reasonable doubt.

Since the case must be retried it is necessary to address several issues.

THE SECOND STATEMENT

The incriminating remarks to Detective Locksa were not offered in the state's case in chief. The statement was brought out by the state in its cross-examination of the defendant. Since no cautionary instructions were given by the trial judge, the jury was free to consider the statement of appellant to Locksa as evidence of guilt.

Appellant argues that the testimony of Detective Locksa should not have been admitted because it was obtained after the appellant had requested the assistance of counsel. The appellant

---

3. Because we are remanding for a new trial, we do not feel it is necessary to analyze the references made to appellant's silence in the prosecutor's closing argument.

relies on Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

The State contends, however, that Edwards v. Arizona, supra, is inapplicable to the case at bar. It argues that Edwards only spoke to waiver of counsel pursuant to reinterrogation of the same offense, whereas the appellant in the instant case was reinterrogated on other matters.

The precise issue that this Court must decide is whether appellant's fifth and fourteenth amendment rights were violated when he was questioned about two unrelated homicides after having asserted a right to counsel incident to the Barrick homicide. We decide today the issue left open in State v. Hensley, No. 5556 (Ariz. filed June ___, 1983).

The State argues that Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), controls this issue. In Mosley, the U.S. Supreme Court considered the propriety of questioning a suspect about one crime after the suspect had invoked his right to remain silent when he was questioned earlier about an unrelated crime. The Court held that a reinterrogation is not a violation of a suspect's fifth amendment right to silence where the invocation of that right is "scrupulously honored." Id., at 104, 96 S.Ct. at 326. The Court found that the resumption of interrogation about an unrelated offense was not inconsistent with Mosley's earlier refusal to answer any questions. Id. at 105, 96 S.Ct. at 327.

Michigan v. Mosley, supra, however, did not address the procedures to be followed after a defendant invokes his right to counsel. The majority opinion in Mosley meticulously distinguished the right to silence from the right to counsel: "The present case does not involve the procedures to be followed if the person in custody asks to consult with a lawyer, since Mosely made no such request at any time." Id., at 101, n. 7, 96 S.Ct. at 325. And again: "[T]he Court in Miranda . . . distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and directed that 'the interrogation must cease until an attorney is present' only '[i]f the individual states that he wants an attorney. 384 U.S. at 474, 86 S.Ct. 1628.'" Id. at 104, n. 10, 96 S.Ct. at 326.

The procedures governing the reinterrogation of a suspect after he invokes his right to counsel were detailed by the Supreme Court in Edwards v. Arizona, supra. In Edwards, the defendant was reinterrogated after previously invoking his right to counsel in an earlier interview. The Supreme Court determined that Edwards' confession, given during the second custodial interrogation, was inadmissible. The court stated:

> we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated

> custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police. 451 U.S. at 484-85, 101 S.Ct. at 1884-1885 (footnote omitted).

The only difference between Edwards and the appellant is that Edwards was questioned about the same offense after a request for counsel while the appellant was reinterrogated about an unrelated offense. We do not believe that this factual distinction holds any legal significance for fifth amendment purposes.

The language of Edwards is unequivocal; an accused who has asserted his right to counsel "is not subject to further interrogation by the authorities until counsel has been made available to him." 451 U.S. at 485, 101 S.Ct. at 1885. The rule prohibits "further interrogation." Nowhere in Edwards does the majority indicate that reinterrogation of the accused is permissible if the authorities merely shift the line of questioning to other matters or unrelated offenses. Such a rule would render the Edwards opinion meaningless and invite the ingenious officer to invent new schemes to produce colorable waivers of the fifth amendment rights.

The assertion of the right to counsel is an expression by the accused that he is not competent to deal with the authorities without legal advice.[4] See Edwards v. Arizona, supra. The resumption of questioning in the absence of an attorney after an accused has invoked his right to have counsel present during police interrogation strongly suggests to an accused that he has no choice but to answer. Thus, "a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism." Michigan v. Mosely, 423 U.S. at 111, n. 2, 96 S.Ct. at 329 (White, J., concurring).

We therefore hold that, after requesting counsel during the initial interrogation, the appellant should not have been subjected three days later to interrogation which he did not initiate, without counsel having been made available to him.

Regarding the statement to Locksa, we note that it was admitted as impeachment evidence on cross examination of the appellant rather than in the State's case in chief. In Harris v. New York, 401

---

4. In contrast, the U.S. Supreme court has stated that the assertion of the right to silence is merely an expression of the accused's desire to cut off questioning with respect to a specific subject. The lines of communication between the accused and the authorities remain open, as the accused has chosen to make his own decisions in regards to future police interrogation. See Michigan v. Mosley, supra.

U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), the U. S. Supreme Court held that a Miranda violative statement that is inadmissible against a defendant in the prosecution's case in chief, may, if its trustworthiness satisfies legal standards, be used for impeachment purposes to attack the credibility of the defendant. The State contends that the remarks to Locksa were properly admitted to attack the appellant's credibility by cross-examining him on the inconsistencies between his hospital statement to Detective Locksa and his statements at trial.

In State v. Swinburne, 116 Ariz. 403, 569 P.2d 833 (1977), we stated:

> In Oregon v. Hass, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 510 (1975), the Supreme Court held admissible for impeachment purposes inculpating post-arrest statements of the defendant made after he had been given his Miranda rights and exercised his right to request a lawyer, but before he had been furnished with counsel. The court said that evidence which is otherwise inadmissible against the defendant in the prosecution's case in chief is not barred for all purposes, provided that "the trustworthiness of the evidence satisfies legal standards." 420 U.S. at 721, 95 S.Ct. at 1221, 43 L.Ed.2d at 577. State v. Swinburne, supra, 116 Ariz. at 412, 569 P.2d at 842.

It is clear, therefore, that statements obtained in violation of an accused's fifth amendment right to counsel may be

used for impeachment purposes to attack the credibility of the accused. See State v. Swinburne, supra, and Oregon v. Hass, supra. In the instant case, however, the jury was not instructed as to the restricted and limited purpose for which the statements could be considered, namely, impeaching the appellant's credibility. In both Harris and Hass the federal supreme court carefully noted that specific instructions were given to the jury concerning the limited purpose for the use of such testimony.

In the event of retrial the statement to Locksa may be used by the state for impeachment, but proper instructions to the jury must be given to limit the use of such testimony to the issue of credibility of appellant and not as evidence of guilt.

EVIDENTIARY ISSUE

Appellant contends that the trial court erred in admitting into evidence photographs of the victim and a bloody shirt found at the scene. He argues that these items had no probative value, were highly prejudicial, and their admission only served to inflame the jury.

Evidence which may tend to incite the jury's emotions is admissible if it is relevant and if its probative value outweighs the danger of unfair prejudice created by its admission. State v. Chapple, No. 5054 (Ariz., filed Jan. 11, 1983); State v. Gerlaugh, 134 Ariz. 164, 654 P.2d 800 (1982); Rule 403, Ariz. R. of Evid., 17A A.R.S. In making this determination, the court will look to the

purpose of the offer. State v. Chapple, supra. Photographs are admissible to identify the victim, to illustrate how the crime was committed, to aid the jury in understanding testimony, and to show the location of the wounds. State v. Navarre, 132 Ariz. 480, 647 P.2d 178 (1982); State v. Vickers, 129 Ariz. 506, 633 P.2d 315 (1981). The purpose for which the photographs are admitted must, however, be a contested issue. State v. Chapple, supra.

In the instant case, the photographs showed the location and extent of the victim's wounds. Because the appellant asserted self defense at trial, the location of the wounds was evidence to contradict appellant's story and to support the state's theory of how the homicide was committed. See State v. Gretzler, 126 Ariz. 60, 621 P.2d 1023 (1980). The wounds found on the victim's hands and in the back of his head are probative evidence that the defendant was not acting in self defense and that the victim may not have been lying down during the attack, as appellant testified. The extent of the wounds also tends to show that the appellant was not acting in self defense. Furthermore, the photographs aided the jury in understanding the pathologist's testimony as to the wounds on the victim. See State v. Navarre, supra.

Trial courts have great discretion in the admission of photograhs. State v. Schad, 129 Ariz. 557, 633 P.2d 366 (1981); State v. Clark, 126 Ariz. 428, 616 P.2d 888, cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980). This discretion will not be

disturbed unless it has been clearly abused. State v. Gerlaugh, supra. Although the photographs are of the type that may arouse the emotions of some jurors, we cannot conclude that the trial court abused its discretion in finding that the probative value of the photographs outweighed the danger of unfair prejudice attendant to their admission. We find no error.

As to the shirt, however, we agree with the appellant that its admission was error. The State argues that the shirt also corroborated its theory of the murder and, therefore, is admissible. The shirt by itself, however, proves nothing. It is only its location and condition after the murder that is relevant to the State's case. The admission of gruesome objects when they add nothing to the evidence to be considered by the jury and serve no other purpose than to inflame the jury is error, State v. Steele, 120 Ariz. 462, 586 P.2d 1274 (1978), and we so find in this case.

ATTEMPTED MURDER CHARGE

The appellant finally contends that the trial court erred in failing to grant his motion for judgment of acquittal on the count of attempted murder.

The standard of review to test the sufficiency of evidence on appeal is whether there exists substantial evidence from the entire record from which a rational trier of fact could have found guilt beyond a reasonable doubt. State v. Tison, 129 Ariz. 546, 633 P.2d 355

(1981); State v. Schad, 129 Ariz. 557, 633 P.2d 366 (1981), cert. denied, 455 U.S. 983, 102 S.Ct. 1492, 71 L.Ed.2d 693 (1982). The evidence will be reviewed in the light most favorable to sustaining the verdict and all reasonable inferences will be resolved against a defendant. State v. Tison, supra; State v. Hall, 129 Ariz. 589, 633 P.2d 397 (1981).

To sustain a conviction for attempted murder, the evidence must show some overt act or steps taken toward the commission of the crime and an intent to commit the crime. State v. Savchick, 116 Ariz. 278, 569 P.2d 220 (1977); State v. Mandel, 78 Ariz. 226, 278 P.2d 413 (1954); A.R.S. § 13-1001(A)(2). Criminal intent, being a state of mind, is shown by circumstantial evidence. Defendant's conduct and comments are evidence of his state of mind. State v. Vann, 11 Ariz.App. 180, 463 P.2d 75 (1970).

The record reveals that as Robert Barrick was getting out of the canal, he was hit in the head with a hammer by the defendant. According to Barrick's testimony, he was "knocked out" for a few seconds and floated down the canal, during which time appellant followed alongside the canal. Routhier asked Barrick if he had any money and ordered him out of the canal with the threat that if he did not do so, Routhier would hurt his father. Barrick got out on the opposite side of the canal and climbed up to the freeway to summon help. As he did so, appellant continued to yell at Barrick to "get over there."

There is substantial evidence that appellant performed an overt act toward

the commission of the crime. The appellant struck Barrick in the head, a vital area of the body, with a dangerous instrument. There is also evidence from which a rational trier of fact could have found that the appellant had the requisite intent to be guilty of attempted murder. Appellant had just severely beaten Lawrence Barrick. He followed Robert Barrick along the canal and ordered him to get out after once hitting him with the same instrument that killed his father. While the evidence is not overwhelming, it is substantial. See State v. Tison, supra; State v. Bearden, 99 Ariz. 1, 405 P.2d 885 (1965). We find no error.

The conviction for first degree murder and for attempted first degree murder are reversed and the case remanded to the superior court for a new trial.

WILLIAM A. HOLOHAN, Chief Justice

CONCURRING:

FRANK X. GORDON, JR., Vice Chief Justice
JACK D. H. HAYS, Justice
JAMES DUKE CAMERON, Justice
STANLEY G. FELDMAN, Justice

3031D:bb

APPENDIX "B"

APPENDIX "B"

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

STATE OF ARIZONA,

Appellee,

-vs-

DENNIS EARL ROUTHIER,

Appellant.

Supreme Court No. 5390
Appeal from the Superior Court
of Maricopa County
Cause No. CR-115186

The following action was taken by the Supreme Court of the State of Arizona on September 13, 1983 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing = DENIED."

Copy of Order Reversing Convictions and Remanding for New Trial enclosed.

S. ALAN COOK, Clerk
By GAIL JACKSON
Deputy Clerk

Office - Supreme Court, U.S.
FILED
DEC 5 1983
ALEXANDER L. STEVAS
CLERK

83-837

NO. 83-____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1983

STATE OF ARIZONA,

Petitioner,

-vs-

DENNIS EARL ROUTHIER,

Respondent.

APPENDIX A and B TO

PETITION FOR WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

ROBERT K. CORBIN
Attorney General of
the State of Arizona

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division

GERALD R. GRANT
Assistant Attorney General
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602)255-4686

Attorneys for PETITIONER

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

Opinion of the Arizona Supreme Court

STATE OF ARIZONA,
Appellee,
-vs-
DENNIS EARL ROUTHIER,
Appellant.

Supreme Court No. 5390
Appeal from the Superior Court
of Maricopa County
Cause No. CR-115186
Filed: July 6, 1983
S. Alan Cook, Clerk

HOLOHAN, Chief Justice:

OPINION

A jury found appellant, Dennis Earl Routhier, guilty of first degree murder and attempted first degree murder. He was sentenced to death on the first degree murder charge and to 21 years on the charge of attempted first degree murder. Appellant appeals these convictions and sentences. We have

jurisdiction of this case pursuant to Arizona Const. art. 6 § 5 and A.R.S. § 13-4031.

The appellant raises seven issues on appeal but we believe the answers to the following questions will be dispositive of the appeal:

1. Whether the scope of the prosecutor's cross-examination of the appellant violated his fifth and fourteenth amendment rights.
2. Whether photographs of the deceased and a bloody shirt were erroneously admitted into evidence.
3. Whether the trial court erred in not granting appellant's motion for acquittal on the count of attempted murder.

The following facts are necessary for a resolution of the issues presented.

On the morning of September 20, 1980, Lawrence Barrick and his son, Robert, stopped the vehicle in which they were travelling to aid a man who had flagged them down. Dennis Earl Routhier, appellant, told the Barricks he was having trouble with his truck. The Barricks drove the appellant to his truck, which was parked some distance off the main road. When the three men arrived at the truck, a '56 Chevy, the appellant stated he would make one more attempt to start it. The truck started unaided. The three men then sat on the tailgate of the Barricks' truck and drank some beer.

After finishing their beer, the Barricks drove to a friend's house. The appellant was invited to follow them in his own truck, and he did. The Barricks' friend was not at home so they decided to drive out to Roosevelt irrigation canal

and take a swim. The appellant followed the Barricks to the canal.

Robert Barrick jumped into the canal and swam for five to ten minutes. As Robert began to climb out of the canal, the appellant approached him and hit him in the head with a hammer. Robert was cut and knocked unconcscious for a few seconds. He testified that appellant asked him if he had any money, to which Robert replied "No." Appellant then instructed Robert to get out of the canal or his father would be harmed. At this point Robert noticed that his father was slumped over on the ground by his truck. Robert climbed the opposite bank of the canal and ran to the nearby freeway to summon help.

Meanwhile, the appellant sped away in his truck. When the police arrived at the scene, they found Lawrence Barrick

beaten and bleeding profusely from the head and neck. He died soon afterwards. Medical testimony revealed that he died of multiple wounds inflicted by a blunt instrument.

Later that afternoon, police apprehended the appellant after a high speed chase on the freeway. The chase terminated when the appellant's truck swerved into a semi-truck and rolled off the freeway. The appellant was taken into custody and admitted to Good Samaritan Hospital for treatment of head and leg injuries.

Appellant's testimony at trial was that he killed Lawrence Barrick in self-defense. He claimed that Barrick attacked him without reason and appellant only used his hammer when Barrick tried to gouge his eye out. Additional facts pertinent to questions raised by the appellant will be discussed as necessary.

HOSPITAL STATEMENTS

On the morning of September 21, 1980, Detective Barber of the Phoenix Police Department visited the appellant at Good Samaritan Hospital. The appellant was informed of his rights to silence and to the services of an attorney. He stated that he understood his rights and was willing to submit to questioning. Appellant signed a waiver of rights card, and the interrogation began. During the interrogation the appellant indicated that he remembered meeting an old man and his son, having a disagreement with the old man and hitting both individuals with his fists. When asked by Detective Barber whether he had used a hammer, the appellant stated that he may have been mad enough to use one, but he did not believe that he had. Detective Barber then asked the appellant to elaborate on

specific details, but the appellant stated that he wanted to speak with an attorney. At that point, the questioning ceased.

Three days after the first interview at Good Samaritan Hospital, before counsel had been provided him, the appellant was interrogated a second time by a Detective Locksa. The interrogation was conducted at the detention ward of Maricopa County Hospital, where the appellant had been transferred from Good Samaritan Hospital. Detective Locksa had been advised by Detective Barber of the appellant's previous request for counsel. The appellant was again informed of his rights to silence and legal representation. Detective Locksa further told the appellant that he did not want to discuss the Barrick homicide but that he wanted to discuss two

unrelated homicide cases. The appellant stated that he was willing to talk to the detective. In response to Detective Locksa's questions regarding these unrelated homicides, the appellant implicated himself in the Barrick homicide. His precise words were, "I have never done anything like this before. The only reason I did what I did is that I was totally shitfaced, I probably would not have even hit the old man if it hadn't been for his big mouth."

The appellant was charged by indictment with having committed first degree murder and attempted first degree murder. Subsequently, pursuant to a plea agreement, the appellant appeared before the superior court to enter a no contest plea. At the hearing on the no contest plea a set of police reports and the medical examiner's report were admitted

into evidence to establish a factual basis for the plea.

Before the plea was accepted by the superior court, the appellant asked to withdraw the plea. The request was granted, and the case was transferred to another superior court judge.

Prior to trial, the appellant moved to suppress all of his hospital statements[1] on the grounds that they were involuntary due to appellant's physical condition at the time of interview. No mention was made of the appellant's request for counsel in his motion to suppress or at the voluntariness hearing. Both Detectives

---

1. Those made during the first interview at Good Samaritan Hospital to Detective Barber and those made during the second interview at the County Hospital to Detective Locksa.

Barber and Locksa testified at the voluntariness hearing and neither one mentioned the appellant's request for counsel. The appellant's motion to suppress his statements was denied. The trial court found that the statements were voluntarily made after the appellant had waived his constitutional rights.

At trial, when the appellant was being cross-examined, the fact of his request for counsel was brought out by the prosecution. At that point defense counsel made a motion to preclude any questioning of the appellant regarding statements made by him during the second interview on the grounds of inadequate showing of Miranda[2] compliance. The trial judge denied the motion stating that he had already ruled that the statements

---

2. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

were voluntary and admissible. Defense counsel, however, did not make any motion concerning the cross-examination of appellant on matters to which he had invoked his right to silence and counsel.

The prosecutor then questioned the appellant on the substance of his incriminating statement to Detective Locksa. Specifically, the prosecutor read the statement in court and asked the appellant if he remembered making it. The appellant stated he did not remember making such a statement.

Detective Barber was recalled by the state in rebuttal, and he testified that the appellant had invoked his right to counsel during the first interview at Good Samaritan Hospital and that he told Detective Locksa before Locksa interviewed the appellant a second time, that the appellant had previously invoked his right

to counsel. Detective Locksa testified that Detective Barber had, in fact, informed him that the appellant requested an attorney when Barber was interviewing the appellant.

Appellant challenges the admission of his hospital statements.

THE DOYLE ISSUE

The appellant argues that he was denied due process by the prosecutor's reference to his post-arrest silence. During cross examination of appellant the following testimony was elicited:

> Q. [by the prosecutor] But you don't remember that you had told them that it was possible that you used a hammer?
>
> A. Oh, yes, I think I might have told them it was possible I might have.
>
> Q. But you didn't tell them that the man had been gouging your eye out, did you?
>
> A. I don't recall. I don't think so. I don't think I'd want to tell them that.

Q. Why not?

A. Well, after I found out where I was and what I was -- you know, the situation I was in, I wanted to speak to a lawyer. I do recall asking him that or telling him that -- not him, but the other officer I talked to. I do recall saying I'd just as soon speak to an attorney, yes. I did hit the man, that's all I recall saying. However, I put it, that's exactly what I meant out of it was, yes, I did hit the man, and, yes, I'd like to see an attorney. They proceeded asking questions after I told them I wanted to see an attorney and kept on and on. What they got off that, I don't know. I'm sure it was just, you know, to show them that I was not gonna talk anymore.

Q. But at that time you at no point mentioned any kind of self-defense?

A. I don't think so. No, I didn't discuss any of the details with them.

The State also brought out in its case in chief on redirect examination of Detective Barber the following:

Q. BY MR. HOTHAM [the prosecutor]: Mr. Bohm [defense counsel] asked you whether it wasn't a fact that the defendant admitted to you that he had struck an older man and a younger man, is that correct?

A. That's correct.

Q. The -- did the defendant tell you anything about the victim coming at him?

A. The defendant made no mention at all of the victim attacking him or approaching him in any manner to me.

Q. Did he tell you anthing about the victim threatening him?

A. No, he did not.

Q. Did he tell you anything about the victim having a gun?

A. No, he did not.

Q. All he stated to you was that he remembers striking both the older man and the younger man, but thought it was with his fists, and then he might have been mad enough to pick up a hammer, but he did not recall doing that; is that correct?

A. That's correct.

Initially, we note that defense counsel made no objection to any of the questioning now being challenged. Although objection is usually required to preserve a question for appeal, an objection is not necessary in the case of fundamental error. State v. Navarre, 132 Ariz. 480, 647 P.2d 178 (1982). Because appellant asserts that fundamental error was committed in this case and we are obligated to review the record for such error, State v. Post, 121 Ariz. 579, 592 P.2d 775 (1979), we address appellant's contention that his post arrest right to silence was violated.

The United States Supreme Court has ruled that a defendant cannot be impeached by his post-arrest silence after being read his Miranda warnings. Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 48 L.Ed.2d 91 (1976); see Fletcher

v. Weir, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982). This ruling is consistent with Arizona case law which has established that a defendant's silence at the time of arrest cannot be used against him as inconsistent with testimony given at trial. State v. Anderson, 110 Ariz. 238, 517 P.2d 508 (1973); State v. Shing, 109 Ariz. 361, 509 P.2d 698 (1973); see State v. Ward, 112 Ariz. 391, 542 P.2d 816 (1975). These decisions are grounded on the principle that the Miranda warnings implicitly assure a person that the exercise of his rights carries no penalty and cannot be used against him. See Doyle v. Ohio, supra.

The State argues that the above rationale does not apply in this case because appellant waived his constitutional rights. While it might be

true that appellant signed a waiver of rights card at the beginning of the interview with Detective Barber, appellant was not inextricably bound by that waiver. As stated in Miranda:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.
>
> * * * *
>
> Moreover, where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated. Miranda v. Arizona, 384 U.S. at 473-74; 475-76, 86 S.Ct. at 1627-1628.

In this case it is clear that, although appellant initially waived his rights, he subsequently reinvoked those rights by requesting an attorney. Detective Barber

in fact testified that he understood appellant was invoking his rights and ceased questioning. Appellant's express invocation of his rights, as well as his failure to make a complete statement or to answer particular questions, distinguishes this case from, e.g., State v. Reinhold, 123 Ariz. 50, 597 P.2d 532 (1979); State v. Tuzon, 118 Ariz. 205, 575 P.2d 1231 (1978) and State v. Raffaele, 113 Ariz. 259, 550 P.2d 1060 (1976). While it was permissible for the prosecutor to question the appellant and Detective Barber on matters which the appellant had volunteered prior to reinvoking his rights, it was impermissible to ask questions on matters about which the appellant had not made any comment or given any information. In

doing so, the State violated appellant's fifth amendment right to silence.[3]

FUNDAMENTAL ERROR

Since the violation of appellant's constitutional rights constituted fundamental error, the remaining issue is whether the error was harmless. State v. Anderson, supra. From a review of the record we cannot say that the error was harmless beyond a reasonable doubt.

Since the case must be retried it is necessary to address several issues.

THE SECOND STATEMENT

The incriminating remarks to Detective Locksa were not offered in the state's

---

3. Because we are remanding for a new trial, we do not feel it is necessary to analyze the references made to appellant's silence in the prosecutor's closing argument.

case in chief. The statement was brought out by the state in its cross-examination of the defendant. Since no cautionary instructions were given by the trial judge, the jury was free to consider the statement of appellant to Locksa as evidence of guilt.

Appellant argues that the testimony of Detective Locksa should not have been admitted because it was obtained after the appellant had requested the assistance of counsel. The appellant relies on Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

The State contends, however, that Edwards v. Arizona, supra, is inapplicable to the case at bar. It argues that Edwards only spoke to waiver of counsel pursuant to reinterrogation of the same offense, whereas the appellant

in the instant case was reinterrogated on other matters.

The precise issue that this Court must decide is whether appellant's fifth and fourteenth amendment rights were violated when he was questioned about two unrelated homicides after having asserted a right to counsel incident to the Barrick homicide. We decide today the issue left open in State v. Hensley, No. 5556 (Ariz. filed June ___, 1983).

The State argues that Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), controls this issue. In Mosley, the U.S. Supreme Court considered the propriety of questioning a suspect about one crime after the suspect had invoked his right to remain silent when he was questioned earlier about an unrelated crime. The Court held that a reinterrogation is not a violation of a

suspect's fifth amendment right to silence where the invocation of that right is "scrupulously honored." Id., at 104, 96 S.Ct. at 326. The Court found that the resumption of interrogation about an unrelated offense was not inconsistent with Mosley's earlier refusal to answer any questions. Id. at 105, 96 S.Ct. at 327.

Michigan v. Mosley, supra, however, did not address the procedures to be followed after a defendant invokes his right to counsel. The majority opinion in Mosley meticulously distinguished the right to silence from the right to counsel: "The present case does not involve the procedures to be followed if the person in custody asks to consult with a lawyer, since Mosely made no such request at any time." Id., at 101, n. 7, 96 S.Ct. at

325. And again: "[T]he Court in Miranda . . . distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and directed that 'the interrogation must cease until an attorney is present' only '[i]f the individual states that he wants an attorney. 384 U.S. at 474, 86 S.Ct. 1628.'" Id. at 104, n. 10, 96 S.Ct. at 326.

The procedures governing the reinterrogation of a suspect after he invokes his right to counsel were detailed by the Supreme Court in Edwards v. Arizona, supra. In Edwards, the defendant was reinterrogated after previously invoking his right to counsel in an earlier interview. The Supreme Court determined that Edwards' confession, given during the second

custodial interrogation, was inadmissible. The court stated:

> we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police. 451 U.S. at 484-85, 101 S.Ct. at 1884-1885 (footnote omitted).

The only difference between Edwards and the appellant is that Edwards was questioned about the same offense after a request for counsel while the appellant was reinterrogated about an unrelated offense. We do not believe that this factual distinction holds any legal significance for fifth amendment purposes.

The language of Edwards is unequivocal; an accused who has asserted his right to counsel "is not subject to further interrogation by the authorities until counsel has been made available to him." 451 U.S. at 485, 101 S.Ct. at 1885. The rule prohibits "further interrogation." Nowhere in Edwards does the majority indicate that reinterrogation of the accused is permissible if the authorities merely shift the line of questioning to other matters or unrelated offenses. Such a rule would render the Edwards opinion meaningless and invite the ingenious officer to invent new schemes to produce colorable waivers of the fifth amendment rights.

The assertion of the right to counsel is an expression by the accused that he is not competent to deal with the

authorities without legal advice.[4] See Edwards v. Arizona, supra. The resumption of questioning in the absence of an attorney after an accused has invoked his right to have counsel present during police interrogation strongly suggests to an accused that he has no choice but to answer. Thus, "a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism." Michigan v. Mosely, 423 U.S. at 111, n. 2, 96 S.Ct. at 329 (White, J., concurring).

---

4. In contrast, the U.S. Supreme court has stated that the assertion of the right to silence is merely an expression of the accused's desire to cut off questioning with respect to a specific subject. The lines of communication between the accused and the authorities remain open, as the accused has chosen to make his own decisions in regards to future police interrogation. See Michigan v. Mosley, supra.

We therefore hold that, after requesting counsel during the initial interrogation, the appellant should not have been subjected three days later to interrogation which he did not initiate, without counsel having been made available to him.

Regarding the statement to Locksa, we note that it was admitted as impeachment evidence on cross examination of the appellant rather than in the State's case in chief. In Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), the U. S. Supreme Court held that a Miranda violative statement that is inadmissible against a defendant in the prosecution's case in chief, may, if its trustworthiness satisfies legal standards, be used for impeachment purposes to attack the credibility of the defendant. The State contends that the remarks to Locksa were properly admitted

to attack the appellant's credibility by cross-examining him on the inconsistencies between his hospital statement to Detective Locksa and his statements at trial.

In State v. Swinburne, 116 Ariz. 403, 569 P.2d 833 (1977), we stated:

> In Oregon v. Hass, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 510 (1975), the Supreme Court held admissible for impeachment purposes inculpating post-arrest statements of the defendant made after he had been given his Miranda rights and exercised his right to request a lawyer, but before he had been furnished with counsel. The court said that evidence which is otherwise inadmissible against the defendant in the prosecution's case in chief is not barred for all purposes, provided that "the trustworthiness of the evidence satisfies legal standards." 420 U.S. at 721, 95 S.Ct. at 1221, 43 L.Ed.2d at 577. State v. Swinburne, supra, 116 Ariz. at 412, 569 P.2d at 842.

It is clear, therefore, that statements obtained in violation of an accused's fifth amendment right to counsel may be

used for impeachment purposes to attack the credibility of the accused. See State v. Swinburne, supra, and Oregon v. Hass, supra. In the instant case, however, the jury was not instructed as to the restricted and limited purpose for which the statements could be considered, namely, impeaching the appellant's credibility. In both Harris and Hass the federal supreme court carefully noted that specific instructions were given to the jury concerning the limited purpose for the use of such testimony.

In the event of retrial the statement to Locksa may be used by the state for impeachment, but proper instructions to the jury must be given to limit the use of such testimony to the issue of credibility of appellant and not as evidence of guilt.

EVIDENTIARY ISSUE

Appellant contends that the trial court erred in admitting into evidence photographs of the victim and a bloody shirt found at the scene. He argues that these items had no probative value, were highly prejudicial, and their admission only served to inflame the jury.

Evidence which may tend to incite the jury's emotions is admissible if it is relevant and if its probative value outweighs the danger of unfair prejudice created by its admission. State v. Chapple, No. 5054 (Ariz., filed Jan. 11, 1983); State v. Gerlaugh, 134 Ariz. 164, 654 P.2d 800 (1982); Rule 403, Ariz. R. of Evid., 17A A.R.S. In making this determination, the court will look to the purpose of the offer. State v. Chapple, supra. Photographs are admissible to identify the victim, to illustrate how

the crime was committed, to aid the jury in understanding testimony, and to show the location of the wounds. State v. Navarre, 132 Ariz. 480, 647 P.2d 178 (1982); State v. Vickers, 129 Ariz. 506, 633 P.2d 315 (1981). The purpose for which the photographs are admitted must, however, be a contested issue. State v. Chapple, supra.

In the instant case, the photographs showed the location and extent of the victim's wounds. Because the appellant asserted self defense at trial, the location of the wounds was evidence to contradict appellant's story and to support the state's theory of how the homicide was committed. See State v. Gretzler, 126 Ariz. 60, 621 P.2d 1023 (1980). The wounds found on the victim's hands and in the back of his head are probative evidence that the defendant was

not acting in self defense and that the victim may not have been lying down during the attack, as appellant testified. The extent of the wounds also tends to show that the appellant was not acting in self defense. Furthermore, the photographs aided the jury in understanding the pathologist's testimony as to the wounds on the victim. See State v. Navarre, supra.

Trial courts have great discretion in the admission of photograhs. State v. Schad, 129 Ariz. 557, 633 P.2d 366 (1981); State v. Clark, 126 Ariz. 428, 616 P.2d 888, cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980). This discretion will not be disturbed unless it has been clearly abused. State v. Gerlaugh, supra. Although the photographs are of the type that may arouse the emotions of some jurors, we cannot conclude that the trial

court abused its discretion in finding that the probative value of the photographs outweighed the danger of unfair prejudice attendant to their admission. We find no error.

As to the shirt, however, we agree with the appellant that its admission was error. The State argues that the shirt also corroborated its theory of the murder and, therefore, is admissible. The shirt by itself, however, proves nothing. It is only its location and condition after the murder that is relevant to the State's case. The admission of gruesome objects when they add nothing to the evidence to be considered by the jury and serve no other purpose than to inflame the jury is error, State v. Steele, 120 Ariz. 462, 586 P.2d 1274 (1978), and we so find in this case.

ATTEMPTED MURDER CHARGE

The appellant finally contends that the trial court erred in failing to grant his motion for judgment of acquittal on the count of attempted murder.

The standard of review to test the sufficiency of evidence on appeal is whether there exists substantial evidence from the entire record from which a rational trier of fact could have found guilt beyond a reasonable doubt. State v. Tison, 129 Ariz. 546, 633 P.2d 355 (1981); State v. Schad, 129 Ariz. 557, 633 P.2d 366 (1981), cert. denied, 455 U.S. 983, 102 S.Ct. 1492, 71 L.Ed.2d 693 (1982). The evidence will be reviewed in the light most favorable to sustaining the verdict and all reasonable inferences will be resolved against a defendant. State v. Tison, supra; State v. Hall, 129 Ariz. 589, 633 P.2d 397 (1981).

To sustain a conviction for attempted murder, the evidence must show some overt act or steps taken toward the commission of the crime and an intent to commit the crime. State v. Savchick, 116 Ariz. 278, 569 P.2d 220 (1977); State v. Mandel, 78 Ariz. 226, 278 P.2d 413 (1954); A.R.S. § 13-1001(A)(2). Criminal intent, being a state of mind, is shown by circumstantial evidence. Defendant's conduct and comments are evidence of his state of mind. State v. Vann, 11 Ariz.App. 180, 463 P.2d 75 (1970).

The record reveals that as Robert Barrick was getting out of the canal, he was hit in the head with a hammer by the defendant. According to Barrick's testimony, he was "knocked out" for a few seconds and floated down the canal, during which time appellant followed alongside the canal. Routhier asked

Barrick if he had any money and ordered him out of the canal with the threat that if he did not do so, Routhier would hurt his father. Barrick got out on the opposite side of the canal and climbed up to the freeway to summon help. As he did so, appellant continued to yell at Barrick to "get over there."

There is substantial evidence that appellant performed an overt act toward the commission of the crime. The appellant struck Barrick in the head, a vital area of the body, with a dangerous instrument. There is also evidence from which a rational trier of fact could have found that the appellant had the requisite intent to be guilty of attempted murder. Appellant had just severely beaten Lawrence Barrick. He followed Robert Barrick along the canal and ordered him to get out after once

hitting him with the same instrument that killed his father. While the evidence is not overwhelming, it is substantial. See State v. Tison, supra; State v. Bearden, 99 Ariz. 1, 405 P.2d 885 (1965). We find no error.

The conviction for first degree murder and for attempted first degree murder are reversed and the case remanded to the superior court for a new trial.

WILLIAM A. HOLOHAN, Chief Justice

CONCURRING:

FRANK X. GORDON, JR., Vice Chief Justice

JACK D. H. HAYS, Justice

JAMES DUKE CAMERON, Justice

STANLEY G. FELDMAN, Justice

3031D:bb

APPENDIX "B"

APPENDIX "B"

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

STATE OF ARIZONA,

Appellee,

-vs-

DENNIS EARL ROUTHIER,

Appellant.

Supreme Court No. 5390
Appeal from the Superior Court
of Maricopa County
Cause No. CR-115186

The following action was taken by the Supreme Court of the State of Arizona on September 13, 1983 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing = DENIED."

Copy of Order Reversing Convictions and Remanding for New Trial enclosed.

S. ALAN COOK, Clerk
By GAIL JACKSON
Deputy Clerk

THIS PAGE INTENTIONALLY
LEFT BLANK

No. 83-837

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1983

STATE OF ARIZONA,

Petitioner,

- vs. -

DENNIS EARL ROUTHIER,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ARIZONA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROSS P. LEE
Maricopa County Public Defender

TERRY J. ADAMS
Deputy Public Defender
132 South Central, 2nd Floor
Phoenix, Arizona 85004
Telephone: (602) 258-7711

JAMES R. RUMMAGE
Deputy Public Defender
132 South Central, 2nd Floor
Phoenix, Arizona 85004
Telephone: (602) 258-7711

Attorneys for Respondent

QUESTION PRESENTED FOR REVIEW

Where the Respondent requested counsel while being interrogated by police officer, were his Fifth and Fourteenth Amendment rights violated when another officer having been advised that Respondent requested counsel reinterrogated him regarding an unrelated homicide and elicited responses regarding this homicide without Respondent having been provided counsel?

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

STATEMENT OF THE CASE

Respondent Dennis Earl Routhier was charged by indictment on October 2, 1980, with Count I, Murder, first degree, and Count II, Attempted Murder, first degree.

At trial one Robert Barrick testified that he and his father, Lawrence Barrick, were together on September 20, 1980, in a vehicle that was flagged down by an individual who was later identified as the Respondent. He requested their assistance in starting his vehicle. They agreed to assist him and eventually this vehicle was started. The three parties remained together that day drinking beer and eventually went to a canal to go swimming. Robert Barrick testified that he had gone swimming and upon returning to the truck was struck by the Respondent after he had observed his father slumped by his pick-up truck bleeding. A medical examination of Lawrence Barrick revealed that he had died of multiple blows to the head and neck inflicted by a blunt instrument. The Respondent was apprehended by the police after a high speed chase during which the Respondent's vehicle was struck by a truck and he was injured. While confined in a hospital, he was interrogated by police officers regarding this incident. He remained hospitalized for a period of time and was transferred to a detention ward in the Maricopa County Hospital. While there he was reinterrogated by one Detective Locksa during which time he made statements regarding this incident.

Respondent testified during trial that he had acted in self defense after Lawrence Barrick had attacked him. During the struggle, Barrick had tried to gouge his eye out and Respondent was forced to use a hammer to defend himself.

During the Respondent's testimony, it was revealed that while being interrogated initially by the police, he had requested an attorney. The officer interrogating him at this time was F. Jordan Barber. Detective Barber indicated that the Respondent had indeed requested counsel and when he had done so, Detective Barber ceased questioning him. Officer Locksa approached Detective Barber and indicated his desire to interrogate the Respondent. Detective Barber advised him that the Respondent had requested counsel. Officer Locksa, however, interrogated the Respondent knowing that he had requested counsel and that

counsel had not been provided him. Officer Locksa testified that he approached the Respondent while he was in custody at the detention ward of the hospital and again informed him of his rights under Miranda. Officer Locksa had indicated that he wished to interrogate him about matters other than the Barrick homicide. In response to his questions regarding these unrelated homicides, Respondent implicated himself in the Barrick homicide. His precise words were:

> "I have never done anything like this before. The only reason I did what I did is that I was totally shit faced, I probably would have not even hit the old man if it hadn't been for his big mouth."

The Respondent, through counsel, had moved the court to preclude any questioning of the Respondent regarding statements made by him during this second interview. The trial judge denied that motion stating that he had already ruled on the Respondent's statements prior to trial as being voluntary and admissible. A pre-trial voluntariness hearing was conducted however the matter of the Respondent invoking his right to counsel was not addressed.

The Respondent was cross-examined regarding these statements that he made in the second interview and Detective Locksa was called to rebut the Respondent's testimony.

Respondent moved for a mistrial based upon the prosecution's questioning of the witnesses regarding the interrogation by Detective Locksa. Respondent cited Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) in support of that motion. That motion was denied.

The jury returned a verdict of guilty as to both First Degree Murder and Attempted First Degree Murder. The trial court imposed a sentence of 21 years in prison for the Attempted Murder and a sentence of death for the Murder of Lawrence Barrick.

Respondent appealed arguing that the trial court had erred in allowing the prosecution to use statements made by him to law enforcement officers after he had requested counsel. The Arizona Supreme Court reversed Respondent's conviction for several reasons one of which was that the Respondent's Fifth and Fourteenth Amendment rights were violated when he was questioned about two unrelated homicides after having asserted a right to counsel. (State v. Routhier, ___ Ariz. ___, 669 P.2d 68 (1983).

REASONS FOR DENYING THE WRIT

I. THE ARIZONA SUPREME COURT DID NOT DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN DECIDED BY THIS COURT.

Petitioner contends that the question decided by the Arizona Supreme Court is a question of federal law which has not been decided by this Court. Respondent submits that Petitioner's analysis is misdirected. Petitioner views the question presented herein as follows: "Whether the Fifth and Fourteenth Amendments prohibit officers from reapproaching an accused who has invoked his right to counsel after custodial interrogation concerning one of offense and interrogating him about an entirely different case." (Petition for Writ of Certiorari, pp. 20-21). Respondent respectfully submits to this Court that the question is much simpler, specifically: May law enforcement officials reinterrogate an accused after he has requested counsel and before counsel has been provided? That question has been specifically answered by this Court in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

This Court in Edwards was extremely clear in indicating that the assertion of the right to counsel is a significant event and once exercised by the accused "the interrogation must cease until an attorney is present." (101 S.Ct. at 1885.)

Petitioner argues that there should be no "per se rule" concerning who initiated the contact between the accused and the authorities. Citing Justice Powell's concurring opinion in Edwards, Petitioner argues that the question is whether there was a free and knowing waiver of counsel before the interrogation commenced. Respondent here does not submit that Edwards created a "per se rule" but that the Court only reamphasized the ruling in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) that there is a "rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease." (emphasis added) Citing Fair v. Michael C. 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979).

There is no question here as in Edwards that the police reinterrogated the defendant after he requested counsel in violation of that "rigid rule". This is not a new question that need be answered by this Court, this is only an application of

the Edwards doctrine. The Arizona Supreme Court was entirely correct when they observed that there was no difference between this case and the Edwards case except that the Respondent was approached by law enforcement officials on an unrelated offense. In so noting, the court stated:

> The language of Edwards is unequivocal; an accused who has asserted his right to counsel "is not subject to further interrogation by the authorities until counsel has been made available to him." (451 U.S. 45, 101 S.Ct. at 1885). The rule prohibits "further interrogation." Nowhere in Edwards does the majority indicate that reinterrogation of the accused is permissible if the authorities merely shift the line of questioning to other matters or unrelated offenses. Such a rule would render the Edwards opinion meaningless and invite the ingenious officer to invent new schemes to produce colorable waivers of the Fifth Amendment rights." (State v. Routhier, 669 P.2d at 75)

As the Arizona Supreme Court certainly visualized, to allow this type of interrogation would allow complete circumvention of Edwards by the "ingenious officer." If, for example, a person is arrested for three separate burglaries and while being interrogated regarding Burglary No. 1 he invoked his right to counsel could then the ingenious police officer interrogate him regarding Burglary No. 2 and then Burglary No. 3 until such time that the defendant makes statements regarding these matters. Obviously the holding in Edwards would not allow this type of interrogation. Edwards does not hold and Respondent does not suggest that once there is an invocation of the right to counsel, there may never again be communication between an accused and the police. But Edwards has determined that once this right is invoked the police officials may not reinterrogate an accused unless and until he himself of his own volition determines that he wishes to forgo the right he has previously invoked. The majority in Edwards emphasized the importance of who initiates the second confrontation. This is obviously a very important fact to determine in deciding whether or not the accused has chosen to forgo his right. The court in Edwards was clear in stating that the defendant was not powerless to countermand his election to have counsel present or that the authorities could in no event use any incriminating statements made by him prior to having access to counsel. (101 S.Ct. at 1885, 451 U.S. at 485). The court then indicated that had Edwards initiated the meeting, nothing in the Fifth and Fourteenth Amendments would prohibit the police from listening to his voluntary volunteered statements and using them against him at trial. But when police

officers approach an accused who has invoked this right at a later time, he is again being subjected to custodial interrogation without having an access to counsel and clearly his rights to counsel have been violated. There is no distinction between this case and Edwards and, therefore, Petitioner's position that this question has not been answered by this Court is without merit.

For the above reasons, this Court should deny the Writ requested by Petitioner.

CONCLUSION

The case before this Court does not present a question of federal law which has not been settled by this Court. The issue decided by this Court was that police officers may not reinterrogate an in-custody defendant after he has requested counsel before counsel has been provided. This issue has previously been decided by this Court. For this reason, the Writ of Certiorari to the Arizona Supreme Court should be denied.

RESPECTFULLY SUBMITTED,

ROSS P. LEE
Maricopa County Public Defender

By
TERRY J. ADAMS
Deputy Public Defender
132 South Central, 2nd Floor
Phoenix, Arizona 85004
Telephone: (602) 258-7711

No. 83-837

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1983

STATE OF ARIZONA,

Petitioner,

- vs. -

DENNIS EARL ROUTHIER,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ARIZONA

CERTIFICATE OF SERVICE

I hereby certify that one copy of the Motion for Leave to Proceed in Forma Pauperis and Affidavit, the Brief in Opposition to Petition for Writ of Certiorari to the United States Supreme Court, and the Certificate of Service were served on each of the following persons by depositing the copies in a United States post office, with first-class postage prepaid, on this 15 day of December, 1983:

WILLIAM J. SCHAFER III
Chief Counsel, Criminal Division
Arizona Attorney General's Office
1275 West Washington Street
Phoenix, Arizona 85007
Attorney for Petitioner

I further certify that all parties required to be served have been served.

ROSS P. LEE
Maricopa County Public Defender

TERRY J. ADAMS
Deputy Public Defender
132 South Central, 2nd Floor
Phoenix, Arizona 85004
Telephone: (602) 258-7711

JAMES R. RUMMAGE
Deputy Public Defender
132 South Central, 2nd Floor
Phoenix, Arizona 85004
Telephone: (602) 258-7711

Attorneys for Respondent

No. 83-837

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1983

STATE OF ARIZONA,

Petitioner,

- vs. -

DENNIS EARL ROUTHIER,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ARIZONA

APPEARANCE AND NOTIFICATION FORM

The Clerk will enter my appearance as counsel for Dennis Earl Routhier who IN THIS COURT is Respondent.

I certify that I am a member of the Bar of the Supreme Court of the United States:

JAMES R. RUMMAGE
Deputy Public Defender
132 South Central, 2nd Floor
Phoenix, Arizona 85004
Telephone: (602) 258-7711

The person to whom notification should be sent in this case is:

JAMES R. RUMMAGE
Deputy Public Defender
132 South Central, 2nd Floor
Phoenix, Arizona 85004
Telephone: (602) 258-7711

No. 83-837

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1983

STATE OF ARIZONA,

Petitioner,

- vs. -

DENNIS EARL ROUTHIER,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ARIZONA

MOTION FOR LEAVE TO PROCEED IN
FORMA PAUPERIS

Respondent, DENNIS EARL ROUTHIER, pursuant to Rule 46, Supreme Court Rules, asks leave to file the attached Brief in Opposition to Petition for Writ of Certiorari to the Arizona Supreme Court without pre-payment of costs and to proceed in forma pauperis. The Respondent was represented by the Maricopa County Public Defender's Office, of which the undersigned is a member, in the Superior Court of Maricopa County, and on appeal to the Arizona Supreme Court. The Respondent's Affidavit in support of this motion is attached hereto.

Respectfully submitted this 15 day of December, 1983.

ROSS P. LEE
Maricopa County Public Defender

TERRY J. ADAMS
Deputy Public Defender
132 South Central, 2nd Floor
Phoenix, Arizona 85004
Telephone: (602) 258-7711

JAMES R. RUMMAGE
Deputy Public Defender
132 South Central, 2nd Floor
Phoenix, Arizona 85004
Telephone: (602) 258-7711

Attorneys for Respondent

No. 83-837

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1983

STATE OF ARIZONA,

Petitioner,

- vs. -

DENNIS EARL ROUTHIER,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ARIZONA

AFFIDAVIT

I, DENNIS EARL ROUTHIER, being first duly sworn according to law, depose and say, that I am the Respondent in the above-entitled case; that I am currently incarcerated in the Maricopa County Jail; that in support of my motion for leave to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I am not presently employed; that I have not had any income in the past twelve months; that I do not own any cash, checking or savings accounts, nor any valuable property; that both before the state trial court and on appeal, I was represented by appointed counsel; that I believe the State of Arizona is not entitled to the redress sought in this case; the nature of said cause is briefly stated as follows;

I was convicted of First Degree Murder and sentenced to death. The Arizona Supreme Court reversed that conviction holding that my rights under the Fifth and Fourteenth Amendments were violated by law enforcement officials who interrogated me after I requested counsel.

I understand that a false statement in this affidavit will subject me to penalties for perjury.

Dennis E Routhier
DENNIS EARL ROUTHIER

STATE OF ARIZONA)
) SS.
County of Maricopa)

SUBSCRIBED AND SWORN to before me this 15th day of December, 1983.

Amanda May
Notary Public

My Commission Expires:

My Commission Expires Jan. 10, 1987

STATE OF ARIZONA)
) SS.
County of Maricopa)

SUBSCRIBED AND SWORN to before me this 15-a day of December, 1983.

Notary Public

My Commission Expires:

My Commission Expires Jan. 10, 1987

MOTION FILED
DEC 19 1983

No. 83-837

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1983

STATE OF ARIZONA,

Petitioner,

- vs. -

DENNIS EARL ROUTHIER,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ARIZONA

AFFIDAVIT OF FILING

TERRY J. ADAMS, being first duly sworn, upon his oath deposes and says:

That in accordance with Rule 28.2, Supreme Court Rules, he forwarded the following documents for filing to the Clerk, Supreme Court of the United States, Washington, D.C. 20543 by depositing them in a United States Post Office, with first class postage prepaid, on this 15 day of December, 1983:

(1) Motion for Leave to Proceed in Forma Pauperis;

(2) Affidavit in support of Motion for Leave to Proceed in Forma Pauperis;

(3) Brief in Opposition to Petition for Writ of Certiorari;

(4) Certificate of Service;

(5) Appearance and Notification Form

ROSS P. LEE
Maricopa County Public Defender

By _____
TERRY J. ADAMS
Deputy Public Defender
132 South Central, 2nd Floor
Phoenix, Arizona 85004
Telephone: (602) 258-7711
Attorney for Respondent